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IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

GEORGE C. CHAPPELL, *et al.*,
Petitioners,

v.

VERNON WALLACE, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Do Black enlisted personnel in the United States Navy have the right to equal protection, as embodied in the Due Process Clause of the Fifth Amendment, by 42 U.S.C. 1985(3) and by Naval regulations to be free of racial discrimination from their superior officers and the remedy to enforce that right?

2. Does a United States District Court have jurisdiction to review the violations of 42 U.S.C. 1985(3), of naval regulations and of the equal protection rights of Black enlisted personnel by the racially discriminatory actions of their superior officers?

3. Do naval officers and non-commissioned officers enjoy a qualified good faith immunity from injunctive relief, declaratory judgment and money damages for intentional discriminatory action against Black enlisted personnel?

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CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

This case involves the following constitutional provisions, rules, and regulations:

United States Constitution, Article I, Section 1
United States Constitution, Article I, Section 8
United States Constitution, Article III, Section 2
United States Constitution, Amendment V
28 U.S.C. 1331(a)
28 U.S.C. 1343
28 U.S.C. 1391
42 U.S.C. 1985(3)
OPNAV INSTRUCTION 5354.1a (See Appendix to the Brief of Respondents)

STATEMENT OF THE CASE

The respondents are five Black enlisted men formerly stationed aboard the U.S.S. Decatur (DDG 31), who brought this action to stop the blatant racial discrimination exercised against them by the petitioners, their superior officers. The treatment and actions of these officers imposed unconscionable and unmistakable violations of the rights guaranteed to the respondents by the Fifth Amendment Due Process and Equal Protection provisions to be free of intentional and invidious racial discrimination.

The jurisdiction of the federal district court was invoked to enjoin petitioners from denying respondents skilled rates, training for skilled ratings, advancement in ratings, honorable discharges, and unfair treatment in non-judicial punishment; to enforce the naval regulation prohibiting racial discrimination in the treatment of and opportunities available to Black enlisted personnel, and for damages for acts of intentional discrimination by the petitioners and for declaratory relief. (J.A. 16-17)

The jurisdiction of the federal court was invoked due to the clear and substantial violations of the respondents' constitutional rights. The Board for the Correction of Naval Records refused to review the claims. (J.A. 63-69) Furthermore, a Congressional representative and the Chief of Naval Personnel refused to take any action (J.A. 57, 68-70) To redress these issues of constitutional law, statutory law and regulations so that respondents would not suffer irreparable harm by the action of the petitioners in terminating respondents' naval careers, the federal court was called upon to adjudicate these issues.

FACTS

The respondents, Lemons, Richardson and Shannon enlisted in the U.S. Navy in 1975, Wallace enlisted in 1976, and Hickey enlisted in 1977. All of the respondents except for Lemons have unskilled ratings. Hickey, Richardson and Shannon are messmen; Wallace is a seaman, while Lemons is a third class electrician. (J.A. 3-4)

The respondents were transferred to the U.S.S. Decatur on various dates between 1976-1978. Hickey, Richardson and Shannon were transferred to the Supply Department, Wallace went to First Division (Deck) and Lemons went to the Engineering Department.

The officers aboard the U.S.S. Decatur were all white. (J.A. 5) Of the 340 officer and enlisted personnel on the vessel, only 20 were Blacks, including respondents. (J.A. 68) While aboard the vessel, respondents suffered severe racial discrimination in ratings, school assignments, rotation, promotion, evaluations, non-judicial punishment, discharges and threats of physical violence. (J.A. 6-18) This caused respondents great indignity as American citizens and as members of the Black race.

In October 1977, respondent Wallace completed the course for Operations Specialists and was transferred from the Deck Department to the Operations Intelligence (OI) Division to

apply for a skilled rating as an Operations Specialist. He was certified by the Professional Development Board and the OI Division Officer. Nevertheless, the Operations Officer and the Commanding Officer (Chappell), based on their intent to keep Blacks, like Wallace, outside the OI Division, refused to allow Wallace to remain in OI Division. Instead, they transferred Wallace to the unskilled Deck Division to chip paint and wash the bulkheads. OI Division included no Blacks as of July, 1978 (J.A. 6-7)

Respondent Wallace was repeatedly threatened, humiliated, insulted and abused by the petitioners. When he protested the inequality of treatment of Blacks on the U.S.S. Decatur, the threats and vituperative action of the petitioners increased. Graffitti extolling the Ku Klux Klan and demeaning Blacks would appear on a regular basis on the bulkheads and washrooms of the ship. No attempts were made to identify or to discipline those perpetrators of racism aboard the ship. In May, 1978 while deployed to Hawaii, a rope was made in the shape of a noose (known to symbolize the KKK) and was left hanging in Wallace's workspace, right in front of his superior officers. (J.A. 27-29)

Respondents Lemons was subjected to unequivocal racial discrimination by petitioners Schultz, McCannon, Lamser and Viafore, who intentionally lowered Lemons quarterly evaluations and prohibited him from taking the examination for advancement to petty officer-second class. This evaluation resulted from two factors: (1) Lemons was assigned more tasks than were possible to complete, and (2) he was punished by petitioners when he could not complete them. (J.A. 10) This occurred in 1977-1978.

Lemons was exposed to a serious fire and explosion risk when the petitioners made him work in the main control and engineering room where the switchboard was highly unstable and when the force draft blower was broken down.

Respondent Hickey was subjected to racial discrimination in job assignments by petitioners Chappell, Viafore, Bianco and

Papa from July 10, 1977 to August, 1978. Hickey had more experience and schooling than two white messmen in the Supply Department who were sent to the records school and were recommended for the recording clerk position. Also two whites were recommended for messmen petty officer positions by petitioners even though Hickey had an excellent work record, more experience and more schooling. (J.A. 10-11)

Then, in October 1978, petitioner Bianco threatened to transfer Hickey to Deck Division to chip paint and clean decks (one of the least skilled jobs on the ship) because of Hickey's actions in opposing racial discrimination on the U.S.S. Decatur. (J.A. 38)

Respondent Richardson was also discriminated against by the petitioners because of his race. In July, 1978, the petitioners sent two white seamen to records school and recommended them for positions as records clerks in Supply Department even though Richardson had more experience in Supply. (J.A. 13) Respondent Richardson was ordered to work in the galley with diesel fuel covering the galley deck by the petitioners who refused to abate the hazardous condition. (J.A. 26)

Finally, respondent Shannon was recommended for a less than honorable discharge as part of a clear and pervasive patter of racial discrimination in August, 1978. Shannon was given a low evaluation. His life was threatened by Bianco. The intentional policy of these superior officers was to conspire against Blacks to force them off the ship and out of the Navy with less than honorable discharges. (J.A. 15)

All of the respondents allege that these actions were a violation of their rights, privileges and immunities secured to them as American citizens and Black people, by the Fifth Amendment to the Constitution, a violation of 42 U.S.C. 1985(3) since petitioners engaged in an intentional conspiracy to deprive them of their rights to be free of racial discrimination guaranteed by the equal protection of the laws, and in violation of the Navy regulations OPNAV Instruction 5354.1a, Chapter II, Section 5, prohibiting racial discrimination in the Navy. (J.A. 2-17)

PROCEEDINGS BELOW

The respondents brought suit on August 24, 1978 in United States District Court for the Southern District of California where the U.S.S. Decatur was home ported, after exhausting their administrative remedies. The respondents sought injunctive relief to enjoin the petitioners: (1) from denying Black personnel skilled ratings, skilled training, and other opportunities for advancement; (2) from recommending less than honorable discharges to persons because of their race; (3) from threatening and intimidating Black enlisted personnel; (4) from giving more severe punishment to Blacks at Captain's Mast. (J.A. 16)

The respondents also sought to enjoin petitioners from violating the naval regulation on equal opportunity and treatment. (J.A. 16) Finally, the respondents sought damages for violation of their rights under 42 U.S.C. 1985(3) and the Fifth Amendment to the Constitution, (J.A. 17) and a declaration of their rights. (J.A. 2)

The District Court granted the petitioners' motion to dismiss based on three grounds: (1) failure to exhaust administrative remedies; (2) the actions are non-reviewable; (3) intra-service immunity. This occurred on January 30, 1979. (Pet. App. 22a).

On December 2, 1981, the Court of Appeals for the Ninth Circuit reversed. It stated that the respondents; stated two causes of action. One was under 42 U.S.C. 1985, while the other was under the equal protection clause of the Fifth Amendment for racial discrimination. (Pet. App. 2a)

The court assumed that the *Bivens* type complaint applied to service people and discussed two points—review of military decisions and immunity of military officers for violation of constitutional rights. (Pet. App. 4a)

As far as review of unconstitutional conduct of military officials, the Court of Appeals decided that there must be a balancing of the conflicting policy decisions—plaintiffs' in-

terest in obtaining redress for unconstitutional actions, on the other hand, the military's interest in maintaining discipline, smooth military operations, and keeping military decisions intact. (Pet. App. 6a)

The court then decided that the *Mindes*[1] principle of review was to be applied to determine if a violation of a recognized constitutional right was alleged and if there had been exhaustion of intraservice remedies. (Pet. App. 7a)

The Court of Appeals found that the respondents alleged a recognized constitutional violation of equal protection against racial discrimiantion. They also found that respondents alleged exhaustion of remedies to the Board for Corrections and Chief of Naval Personnel. (Pet. App. 19)

As a result, the court felt that the constitutional violations complained of should be reviewed by the following four factors to determine if review on the merits should be granted:

1. Strength of plaintiffs' complaint;
2. The potential injury to plaintiff;
3. The interference with military functions;
4. The extent of military expertise.

(App. Pet. 7a)

The court then ordered the case to be returned to the district court to apply the four *Mindes* factors.

The Court of Appeals also held that a military official only enjoys a qualified immunity for violation of the constitutional rights of another service member. It also noted that there may be exceptions to this rule for military officials exercising judicial or prosecutional functions or otherwise during time of war. (Pet. App. 16a)

This Court granted the Writ of Certiorari to the Court of Appeals on November 1, 1982.

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[1] *Mindes* v. *Seaman*, 453 F.2d 197 (5th Cir. 1971)

SUMMARY OF ARGUMENT

I

Enlisted personnel in the armed services, including Black enlisted personnel, enjoy the protection of the Bill of Rights. One by one, most of the guarantees of the constitutional amendments have been held applicable to the military. *Parisi* v. *Davidson*, 405 U.S. 34, 53 (1972) (Douglas concurring). The equal protection clause prohibiting racial discrimination is also applicable to service personnel in the armed services. *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975).

Enlisted personnel also enjoy the protection of federal statutes including those prohibiting racial discrimination in the armed services. *Taylor* v. *Jones*, 653 F.2d 1193, 1200 (8th Cir. 1981). Finally, enlisted personnel are entitled to the protection of regulations prohibiting racial discrimination. *Hall* v. *Fry*, 509 F.2d 1105, 1109 (10th Cir. 1975); *Alvarez* v. *Wilson*, 431 F. Supp. 136 (N.D. Ill. 1977), *app. pending*, No. 81-2696 (7th Cir. 1981).

There is a long history of racial discrimination against Blacks in the armed forces of this country. In the main, Blacks have either been excluded entirely from the Army, Navy and Marine Corps, or have served in segregated units until the practice of Jim Crow was declared to be out of character with the aim of the military by President Harry S. Truman, Executive Order 9981, Federal Register, Vol. 13, p. 4313 (July 28, 1948).

However, de facto racial discrimination has existed in all branches of the armed services, including the Navy, from 1948 to the present. There is both intentional and systematic discrimination against Black service personnel in the military.[2]

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[2] See Dept. of Defense, *Report of the Task Force on The Administration of Military Justice in the Armed Forces*, November 30, 1972, *reprinted* in XIII, *Blacks in the United States Armed Forces: Basic Documents*, 455, 492 (M. MacGregor and B. Nalty editors 1977)

Enlisted personnel have a valid cause of action under *Bivens* v. *Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) to sue their superior officers for intentional racial discrimination in promotions, assignments, transfers, punishment and discharges. In the balance between individual constitutional rights to be free of racial discrimination versus military discipline, no action by the military can justify this severe deprivation of constitutional rights suffered by Blacks. This badge of infamy must be eliminated in the military, as it is being eliminated in the civilian community.

There are no special factors counseling hesitation which the petitioners can point to that would allow the practice of racial discrimination to continue. The special relationship between a superior and the enlisted ranks cannot justify racial conduct.

The military officers must recognize that the new concept of discipline cannot be used as an excuse for racism. The command-enlisted relationship, as well as discipline, break down totally where there is intentional or systematic racial discrimination by the superior officer toward the Black enlisted personnel.

Also, petitioners cannot point to an express remedy provided by Congress. They also fail to identify any internal military remedy that would grant the same remedy as would a *Bivens* action, or a suit for remedies under 42 U.S.C. 1985(3). All of the internal remedies mentioned by the petitioners, including 10 U.S.C. 938, 10 U.S.C. 1552 and the military penal code, cannot serve as a substitute for a federal court action. These so-called internal remedies have been recognized by the courts as being a farce for enlisted personnel. Also, the military has not been able to eliminate racial discrimination internally, it has only been able to perpetrate it.

Finally, failing to recognize the rights of Black enlisted personnel to federal court vindication of their rights will return the Blacks in the military to the days of *Dred Scott* v. *Sanford*, 60 U.S. (19 How.) 393, 426 (1856) where Blacks were not

recognized as having the right to sue to vindicate their rights in the courts.

II

A federal district court has jurisdiction over the military to determine whether its officials are taking action in violation of a federal statute or in excess of statutory authority. *Harmon* v. *Brucker*, 355 U.S. 579 (1958). Otherwise, the military could make flagrant interpretations of federal statutes and deprive the enlisted personnel of their rights without benefit of judicial review. *United States* v. *Larinoff*, 431 U.S. 864 (1977).

There is a very long history in this Court of judicial relief for individuals who have been injured by an act of a government official acting in contravention to a federal statute. *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94 (1902). And the Ku Klux Klan Act, also known as the Civil Rights Act of 1871 [now 42 U.S.C. Section 1985(3)] prohibits all conspiracies, private and public, directed againts Black people seeking to deprive them of the equal protection of the laws. *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971). Federal officials are also answerable under 1985(3) for claims of racial discrimination. *Dry Creek Lodge, Inc.* v. *United States*, 515 F.2d 926, 931 (10th Cir. 1975), *cert. denied*, 449 U.S. 1118, *reh. den.*, 450 U.S. 960. Therefore, military officials must also be answerable to federal review for violations of the laws and Constitution of the United States.

Second, for the same reasons, federal courts can review military administrative action which violates regulations protecting the rights of enlisted personnel. Members of the executive department must comply with self-imposed regulatory and procedural standards in dealing with its personnel. *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959); *Feliciano* v. *Laird*, 426 F.2d 424 (2nd Cir. 1970).

In addition, the review of allegations of constitutional violations should be based on the four *Mindes* factors which permit a federal court to determine whether a recognized constitutional

claim exists. This insures that only recognized constitutional violations are reviewed by the federal courts. *Mindes* v. *Seaman*, 453 F.2d 197.

III

The Court of Appeals was acting in accordance with past precedent of this Court when it held that executive officials only enjoy a qualified good faith immunity from suits alleging a violation of the constitutional amendments. No official is exempt from federal law and an absolute exemption from liability cannot be given except to justify public policy.

Constitutional rights must remain paramount within the military. A plethora of violations of the constitutional rights of Black enlisted personnel would result from an absolute immunity of federal military officials. The enlisted personnel who are made to bear the brunt of racial discrimination suffer an irreparable violation of their constitutional rights. There is no military rationale—the special relationship of a soldier and his superior, military discipline, combat and training, or unhesitating decisive action by a military officer—that would justify absolute immunity for racially discriminatory acts of officials of the military.

Further, granting of absolute immunity to military officers will only exacerbate the contradiction already existing between Black enlisted personnel and white officers. If these contradictions are not resolved through legal means, they find expression in uprisings and strikes that are much more destructive to military discipline than civil suits against federal officers.[3] This Court is at a crossroad--will it say that Blacks in the military are second class citizens and have no federal remedies against discrimination or will it affirm equality of Constitutional rights for all citizens?

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[3] Congressional Black Caucus, *Racism in the Military*, 36582-36596 (October 14, 1972) Cong. Rec. (hereinafter known as "Cong. Rec.").

ARGUMENT

POINT I

BLACK ENLISTED PERSONNEL IN THE UNITED STATES NAVY ARE ENTITLED TO THE SAFEGUARDS OF THE EQUAL PROTECTION CLAUSE, AS EMBODIED IN THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT; THE PROTECTIONS AFFORDED BY THE 1871 KU KLUX KLAN ACT [42 U.S.C. 1985(3)]; AND THE PROTECTION OF NAVAL REGULATIONS [OPNAV INSTRUCTION 5354.1a] TO BE FREE OF RACIAL DISCRIMINATION FROM THEIR SUPERIOR OFFICERS.

The respondents invoked the jurisdiction of the United States district court because their rights as Black enlisted personnel were being violated in three different ways by the petitioners. First, the petitioner officers and non-commissioned officers discriminatorily treated the five respondents in job assignments, training assignments, promotion, rotation, evaluations, captain's mast, discharges and threats of violence in violation of naval regulations prohibiting discriminatory treatment on the basis of race.[4] Second, these same petitioners conspired to deprive the five respondents of their statutory rights under the Fifth Amendment by keeping them out of skilled ratings on the ship, by denying them promotions or advancement to other positions, or the opportunities to attend schools where they would have been able to obtain better ratings and skills. Then, after subjecting respondents to these sufferings of racial oppression, petitioners conspired to discharge respondents with less than honorable discharges. This was done in violation of 42 U.S.C. 1985(3). Lastly, the actions of the petitioners were designed to deprive the respondents of their rights under the Fifth Amendment—not to be mistreated or discriminated against because of race, color or previous condition of servitude.[5]

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[4] OPNAV Instruction 5354.1a, March 8, 1978.

[5] The government argues here that there is no damage remedy for violation of the Fifth Amendment rights of servicemen. But respon-

Blacks in the military must be afforded a constitutional guarantee against racial oppression that is enforceable through civil court action.

A. Black Enlisted Personnel Have Suffered Racially Discriminatory Treatment And The Badge Of Slavery From The Revoultionary Period To The Present.

Blacks have served in the United States armed services since the Revolutionary War. Mueller, *The Negro In The Navy*, 24 Social Forces 110 (1945). Blacks were originally excluded from the Continental Army and Navy by orders of General George Washington. MacGregor and Nalty, *supra*, Vol. I, at 48, 63, 75. This policy was changed by the Continental Congress in 1776 allowing Blacks to enlist because the British were recruiting Blacks and because of manpower shortages. R. J. Stillman, II, *Integration of the Negro In The U.S. Armed Forces*, 8 (1968).

After the War of Independence and as a result of the Southern institution of slavery and the Northern policy of segregation, Congress passed the Militia Act of 1792, which excluded Blacks from militia service. In 1798, the Secretary of the Navy, Benjamin Stoddert, prohibited Blacks and mulattoes from enlisting in the Navy. MacGregor and Nalty, *supra* at 187, 192.

Once again during wartime, Congress permitted Blacks to enlist in the Navy from 1813-1816. But this was again prohibited by 1818. MacGregor and Nalty, *supra* at 213, 218. From 1818 until 1842 Blacks were kept at a five percent quota in the Navy. MacGregor and Nalty, *supra* at 219. And from 1842 to 1860 they were entirely excluded. Stillman, *supra* at 9.

Blacks have served with distinction in integrated crews during the Civil and Spanish American Wars, Mueller, *supra*, at 10; Bureau of Naval Personnel, *The Negro in the Navy*, 1,

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dents allege in their complaint violation of naval regulation, federal statute (42 U.S.C. 1985(3)) and the Fifth Amendment as a basis for relief. (J.A. 3, 7, 8, 10, 11, 12, 13, 14 and 15)

reprinted in MacGregor and Nalty, Vol. VI, 309. In 1922, the Navy suspended Black enlisted altogether, accepting only Filipinos as messmen. Black enlisted were accepted once again in 1933, but only as messmen.[6] By the beginning of World War II, Blacks constituted only 2.9% of the Navy, *Id.*, and there only 6 Blacks on active duty who were not messmen. *Id.* at 309-10.

The Navy changed its policy pursuant to presidential pressure on April 7, 1942 by accepting Blacks for "general service" in all ratings. *Id.* at 103. But, within two weeks, the Secretary of the Navy approved the suggestion made by Rear Admiral Jacobs, Chief of Naval Personnel, "that we train negro recruits . . . in a way to accomplish segregation." *Id.* at 108. Thus, despite the public position that Blacks would be accepted in all ratings, Admiral Jacobs decreed that:

> Apprentice seaman is the only rating in which negroes may be enlisted except those messman ratings previously authorized. Therefore, no requests for enlistment in other ratings shall be forwarded to the Bureau. *Id.* at 116.

The Secretary also limited Black recruitment to fixed quotas below the goal set by the President because of an inability to use Blacks "without resorting to mixed crews. . ." *Id.* at 128.

President Roosevelt himself noted the Navy's recalcitrance. In a memorandum to the Secretary of the Navy, he noted his policy of using Blacks in the armed forces in proportion to their numbers in the general populations. He stressed that the

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[6] *Id.* at 312. In this regard a December 24, 1941 report concluded that no consideration should be given to the further increased employment of enlisted of the Negro race, other than as Navy mess attendant. Among the so-called security rationales underlying this conclusion were the following:

> "the enlistment of Negroes (other than for mess attendants) leads to disruptive and undermining conditions."

Army had met this directive, "but the Navy is so far below. . . ."[7] He concluded:

> You know the headache we have had about this and the reluctance of the Navy to have any negroes. You and I have had to veto that Navy reluctance, and I think we have to do it again. *Id.* at 130-131.

After experimenting with all Black vessels, *Id.* at 243, the Navy ultimately opened sea assignments in integrated crews to Blacks. *Id.* at 244. This, however, was only for auxilitary vessles and only in crews not to exceed 10% of Blacks. *Id.* at 245, 248. In September, 1945, 85% of Blacks in the Navy were in the stewards' branch. Stillman, *supra* at 30. But even this degree of progress was short-lived. By 1946, the Navy had returned to its previous practice. At that time 4.4% of the Navy was Black, and 83% of the Blacks were serving as cooks, stewards or stewards mates. Less than 2% of the whites served in the same capacities. *Id.* at 36[8] In contrast, the Army was 8.2% Black, 9% of which were in the top three grades. Report of the President's Commission on Civil Rights, *To Secure These Rights*, 42, 45 (1948) ("Civil Rights Report").[9]

In the critical area of selecting and promoting Blacks to officer rank, the Navy's enduring racism is also apparent. Thus

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[7] At the time, the figure was 10%. The Army met this goal by 1949. The Navy took 38 years to do so; it did not reach the 10% goal until 1979. The Army stood at 33.2% Black in 1981, while the Navy was 12.0% Black. See Martin Binkin and Mark Eitelberg, *Blacks in the Military*, 42 (1982).

[8] In this regard, it is striking to note that three of the five respondents here, Cornelius Hickey, James Richardson, and George Shannon, all had ratings as messmen. And Wallace is in the unskilled rating of deck seamen.

[9] Recruitment and enlistment patterns between 1949 and 1964 further evidence the Navy's pitiful performance in promoting an integrated service. Thus, while during these years the percentage of Blacks in the Air Force increased from 5.1 to 10.0%; and from 2.1 to 8.7% in the Marine Corps, it only increased from 4.7 to 5.8% in the

in 1943 while under-secretary Adlai E. Stevenson argued for the inevitablity of Black officers, MacGregor and Nalty, *supra*, at 141,[10] the Bureau of Naval Personnel could only bring himself to grudgingly concur on the following basis:

> However unpalatable the idea may be, it is believed certain that . . . the Navy will be required to do so. . . . If the Navy prepares a limited program there is much greater numbers of [Black] officers on any certain percental [sic] basis. Memorandum for the Chief of Naval Personnel, MacGregor & Nalty, *supra*, at 142.

In any event, by 1947, there was still no Black officer with a regular commission. Granger, *Racial Democracy—The Navy Way*, 7 *Common Ground*, 61, 67 (1947). In 1948, there were but two Black naval offices amongst 21,793 Black enlisted men; while in contrast, there was one white officer for every seven white sailors. Similarly, the Coast Guard and the Marines had one and zero Black officers respectively at that time. This was an even worse record than the Army's, which had one Black officer for every 70 Black enlisted men, compared to a one to seven ratio for whites. Civil Rights Report at 1947 in MacGregor and Nalty, *supra*, Vol. VIII, 437.[11]

In 1962, President Kennedy established the Committee on Equal Opportunity in the Armed Forces also known as the Gesell Committee to investigate racial discrimination in the armed services. The Committee found that the Navy was still

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Navy. Stillman, *supra* at 64. Similarly, while the Army and the Air Force had 7,622 and 3,106 cadets each in ROTC units at 15 major Black colleges in 1964-65, there were no Navy ROTC programs at Black schools. *Id.* at 70. This pattern of the Navy lagging behind all other services, in Black enlistment still holds.

[10] He also observed that "one reason we have not had the best of the race is the suspicion of discrimination in the Navy." *Id.*

[11] The persistence of this pattern is further evidenced by the fact that by 1965 the percentage of Black officers in the Navy only reached 0.3%. Stillman, *supra*, at 67.

assigning substantial numbers (over 20%) of Blacks to the food service career field, while Black participation in the career technical fields was slight. The President's Committee on Equal Opportunity in the Armed Forces *Equality of Treatment and Opportunity for Negro Military Personnel Stationed Within the United States, reprinted* in MacGregor and Nalty, *supra*, Vol. XIII at 43. The Committee found that,

> "Many of the Negroes in the Navy and Marine Corps are still grouped in assignments which perpetrate the image of the Negro as a menial or servant *Id.* at 44.

Also, the Gesell Committee found that Black participation in the ranks of non-commissioned and commissioned officers indicated a lack of equality of treatment and opportunity. *Id.* at 46.

The advent of the all volunteer forces of the '70's has increased Black participation in the military, but sadly, it has not begun to eliminate the historical racism evidenced above. Indeed, the available data shows the persistence of discrimination in promotions, job assignments and discipline. Extensive study of Armed Forces data for 1972 shows that Black enlisted men are handicapped in job assignment and promotion policies.

In 1972, according to the Department of Defense, *Report of the Task Force on the Administration of Military Justice in the Armed Forces, reprinted* in MacGregor & Nalty, *supra*, Vol. XIII at 492-493: "Racial and ethnic discrimination exist in both its intentional and systematic manifestation in the military. Both forms have direct and unwholesome effects upon the military system and on the system of military justice . . . [Further], "intentional discrimination, though not condoned, is frequently practiced by some commanders and is not always within the reach of either the service secretaries or the Secretary of Defense."

And the Black Congressional Caucus in 1971 in its investigation of racism in the military found that Blacks are discriminated from the time they enter the service until the day they are discharged. Racism in the military they found takes

the forms of slow advancement, dead end job assignments, disproportionate punishment, subtle harassments, and bad discharges. Cong. Rec. at 36583.

Finally, Department of Defense statistics show in 1981 when Black sailors represented 11.7% of all Naval personnel they were vastly over represented in the low skilled seaman specialties (13.8%), and in service and supply specialties (14.3%). At the same time, they comprise only 5.3% of Electronic Equipment Repairmen and only 6.3% of Technical Specialists. Binkin and Eitelberg, *supra*, at 172.

Study of the available data for the Navy shows that racial discrimination continues to be manifest in the administration of discipline.

> Even when age, pay grade and education are taken into account, incarceration for Blacks in the Navy and Marine Corps are consistently higher than those for whites.

Perry, *An American Dilemma at Sea: Race and Incarceration in the Naval Justice System*, 41 Phylon 50, 56 (1980).

In sum, the history of the American military is one of entrenched and enduring racial discrimination. And the Navy has been, and continues to be, the greatest offender.

B. The Protection Of The Bill Of Rights Extends To Military Personnel.

This Court, as well as numerous other federal appellate courts, have held that military personnel are entitled to the protection of the Bill of Rights.

> *"For the constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers—as well as civilians—from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civil courts."*

Burns v. *Wilson*, 346 U.S. 137, 142-143 (1958).

Following *Burns*, this Court, various federal courts, and the Court of Military Appeals, have applied the Constitution to protect members of the military community. They have been guaranteed their rights to the First Amendment speech provision;[12] to the establishment of religion provision;[13] to the Fourth Amendment provision against unlawful searches;[14] to the Fifth Amendment provision for indictment by a grand jury;[15] to the protections against double jeopardy;[16] to the protection against self-incrimination;[17] to the protection against being deprived of life, liberty or property without due process;[18] to the protections of the Sixth Amendment;[19] and to the protections of the Eighth Amendment prohibiting cruel

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[12] "Members of the military are entitled to the protections of the First Amendment." *Brown* v. *Glines*, 444 U.S. 348, 354 (1980); *Parker* v. *Levy*, 417 U.S. 733, 758 (1974); *Dash* v. *Commanding Officer*, 307 F. Supp. 849 (D.S.C. 1969); *aff'd per curiam*, 429 F.2d 427 (4th Cir. 1970) *cert. denied*, 401 U.S. 981 (1971); *Yahr* v. *Resor*, 431 F.2d 690 (4th Cir. 1970).

[13] *Anderson* v. *Laird*, 466 F.2d 283 (D.C. Cir. 1971)

[14] ". . .GIs are entitled to the protection of the Fourth Amendment." *Committee for GI Rights* v. *Callaway*, 518 F.2d 466, 474 (D.C. Cir. 1975); *Kaufman* v. *Secretary of the Air Force*, 415 F.2d 991, 996 (D.C. Cir. 1969), *cert. denied*, 376 U.S. 1073, *reh. denied*, 397 U.S. 1031 (1970).

[15] Applies to service personnel for crimes other than ones which are service connected. *O'Callahan* v. *Parker*, 395 U.S. 258, 272-273.

[16] *Wade* v. *Hunter*, 336 U.S. 684 (1949); *Sanford* v. *Robbins*, 115 F.2d 435 (5th Cir. 1940), *cert. denied*, 312 U.S. 697 (1941).

[17] *Kaufman* v. *Secretary of the Air Force*, 415 F.2d 991, *supra*.

[18] *Hagopian* v. *Knowlton*, 470 F.2d 201 (2nd Cir. 1972) (denial of right to hearing); *Grimm* v. *Brown*, 449 F.2d 654 (9th Cir. 1971) (denial of a fair and impartial hearing); *Vander Molen* v. *Stetson*. 471 F.2d 617 (D.C. Cir. 1971) (right to notice of hearing).

[19] Right to speedy trial. *United States* v. *Schlack*, 14 U.S.C.M.A. 371, 34 C.M.R. 151 (1964); right to a public trial, *United States* v. *Brown*, 7 U.S.C.M.A. 251, 22 C.M.R. 41 (1958); the right to confront

and unusual punishment.[20] Furthermore, the constitutional right of the equal protection clause applies to members of the military.[21]

This strong tradition recognizing constitutional rights of service personnel was reinforced by the Court of Military Appeals in 1967 when it stated:

> "The time is long since past when this court will lend an attentive ear to the argument that members of the armed forces are, by reason of their status, *ipso facto* deprived of all constitutional rights. *United States* v. *Tempia*, 16 U.S.C.M.A. 426, 37 C.M.R. 249, 253 (1967).

Service personnel are thus entitled to all of the rights and protections of the Bill of Rights. The federal courts have a special duty and obligation to recognize and enforce these rights.

C. Black Enlisted Personnel Have A Cause Of Action Against Their Superior Officers For Damages Under The Due Process Clause Of The Fifth Amendment For Violation Of Their Right To Be Free of Racial Discrimination.

In addition to the protections of the Bill of Rights afforded to all service personnel, Black enlisted personnel also are protected by the provisions of the equal protection clause prohibiting racial discrimination. In terms of legal rights, the equal protection clause of the United States Constitution has been recognized as the greatest source of judicial protection for

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witnesses, *United States* v. *Jacoby*, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960); the right to compulsory service of process, *United States* v. *Sweeney*, 14 U.S.C.M.A. 599, 34 C.M.R. 379 (1964); and the right to assistance of counsel, *Ashe* v. *McNamara*, 355 F.2d 277 (1st Cir. 1965).

[20] *Powers* v. *Hunter*, 178 F.2d 141 (10th Cir. 1949), *cert. denied*, 339 U.S. 986 (1950).

[21] *Frontiero* v. *Richardson*, 411 U.S. 677; *Schlesinger* v. *Ballard*, 419 U.S. 498.

Blacks during the last thirty years since *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

The equal protection clause was intended to remove that form of racial discrimination that "is practically a brand upon them [Blacks], affixed by law, an assertion of their inferiority and a stimulant to race prejudice which is an impediment to securing to individuals of that race that equal justice which the law aims to secure to all others," *Strauden* v. *West Virginia*, 100 U.S. 303, 308 (1880), and that "puts the brand of servitude and degradation" upon Blacks. *Plessy* v. *Ferguson*, 163 U.S. 537, 562 (Justice Harlan dissenting).

Eventually, the Supreme Court adopted the principle that any law predicated on the view that one person is by virtue of race inferior to another offends equal protection. *Brown* v. *Board of Education*, 347 U.S. 483. And racial discrimination has been legally outlawed in public school facilities, as well as courts,[22] parks,[23] beaches,[24] buses,[25] golf courses,[26] and prisons,[27] because of the serious moral and constitutional deprivations involved.

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[22] *Johnson* v. *Virginia*, 373 U.S. 61, 62 (1963)

[23] *New Orleans City Park Improvement Association* v. *Detiege*, 358 U.S. 54 (1958)

[24] *City Council of Baltimore* v. *Dawson*, 350 U.S. 877 (1955).

[25] *Gayle* v. *Browder*, 352 U.S. 903 (1956)

[26] *Holmes* v. *City of Atlanta*, 350 U.S. 879 (1955)

[27] *Lee* v. *Washington*, 390 U.S. 333 (1968). One of the main arguments of the petitioners is that "Personal damage actions [for racial discrimintion] would disrupt military discipline for a number of reasons." (Pet. Brief, p. 22) The similarity between petitioners' argument and the position of Alabama in *Lee* v. *Washington*, *supra*, is quite profound. It is true that both prisoners and service personnel are subject to greater regimentation and discipline than are other members of society. But discipline cannot justify racial discimination and must be eliminated in the military, as it has in prisons.

Equal protection rights to be free from racial discrimination must be enforced through the federal courts. Where a plaintiff is a member of "the class of those litigants who *allege* that their own constitutional rights have been violated, and who at the same time have no other effective means other than the judiciary to enforce these rights, [they] must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights." *Davis* v. *Passman*, 442 U.S. 228, 242 (1979) (Emphasis added).

Chief Justice John Marshall in his opinion in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 162-163 (1803) places the issues of constitutional rights and concomitant remedies in clear perspective.

> "If he has a right, and that right has been violated, do the laws of his country afford him a remedy? The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection . . . The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."[28]

The United States Supreme Court has held that a valid cause of action may be directly implied under the equal protection provision as it is embodied in the Due Process Clause of the Fifth Amendment. *Jacobs* v. *United States*, 290 U.S. 13 (1933); *Bolling* v. *Sharpe*, 347 U.S. 497 (1954); *Davis* v. *Passman*, 442 U.S. 228.

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[28] The petitioners argue that "this Court should not permit implied consitutional damages actions by servicemen against their superiors." (Pet. Brief, p. 15) In essence, the petitioners are arguing against the holding of *Marbury* insofar as they recognize respondents' constitutional right to be free of racial discrimination, but state that respondents should have no remedy in the federal courts.

Also, numerous courts of appeal have implied causes of action under the Due Process Clause of the Fifth Amendment. *Bennett* v. *Campbell*, 564 F.2d 329 (9th Cir. 1977); *Apton* v. *Wilson*, 506 F.2d 83 (D.C. Cir. 1974); *United States ex rel. Moore* v. *Koelzer*, 457 F.2d 892, 894 (3rd Cir. 1972); *Jacobson* v. *Tahoe Regional Planning Agency*, 566 F.2d 1353 (9th Cir. 1977); *modified, Lake Country Estates* v. *Tahoe Regional Planning Agency*, 440 U.S. 391 (1979); *Cox* v. *Stanton*, 529 F.2d 47 (4th Cir. 1975) (Fourteenth Amendment's Due Process Clause).

Numerous federal courts have held that members of the military have a valid cause of action against military officials for violation of their constitutional rights. *Taylor* v. *Jones*, 653 F.2d 1193 (8th Cir. 1981) (racial discrimination); *Tigue* v. *Swain*, 585 F.2d 909 (1978);[29] *Berk* v. *Laird*, 429 F.2d 302, 306 (2nd Cir. 1970), *cert. denied*, 404 U.S. 869 (1971) (transfer to Vietnam); *Klinkhammer* v. *Richardson*, 359 F. Supp. 67, 70 (D.Minn. 1973), *aff'd*, 488 F.2d 920 (8th Cir. 1973) (threat of involuntary inactivation of reservist for hair regulations); *Williams* v. *Rogers*, 449 F.2d 513, 518 (8th Cir. 1971) *cert. denied*, 405 U.S. 926 (1972) (transfer to Philippines); *Crawford* v. *Cushman*, 531 F.2d 1114 (2nd Cir. 1976) (discharge of pregnant woman Marine in violation of due process); *Crozman* v. *Callahan*, 136 F. Supp. 466, 468 (W.D. Okla. 1955); *Nixon* v. *Reeves*, 65 Minn. 159, 67 N.W. 989 (1896) (false imprisonment); *Clark* v. *Cummins*, 47 Ill. 372 (conversion); *Berlin Democratic Club* v. *Rumsfeld*, 410 F. Supp. 144, 162 (D.D.C. 1976) (denial of sixth amendment right to counsel); *Tyler* v. *Pomeroy*, 8 Allen (Mass.) 480 (unlawful court martial); *Zitsen* v. *Walsh*, 352 F. Supp. 438 (D. Conn. 1972)[30] (denied due process

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[29] The court there stated "The complaint alleges sufficient facts to establish that [Captain] Tigue was unlawfully deprived of liberty without due process of law when he was confined at Kirsler Air Force Base for twenty two days." 585 F.2d at 913.

[30] In its decision, the court held "since the plaintiff has sufficiently alleged a non-frivolous federal claim that the defendants have de-

hearing); *Alvarez* v. *Wilson*, 431 F. Supp. 136, *supra*, (racial discrimination by naval officers).

The court in *Alvarez* stated any "intentional discriminatory conduct by federal [Naval] officials, regardless of the fairness of the laws under which they act, constitutes a violation of the concept of equal protection of the laws . . . There can be no question that [Lieutenant] Alvarez's complaint alleges deprivation of federally protected rights." 431 F. Supp. at 141.

This Court in *Dinsman* v. *Wilkes*, 53 U.S. (12 How.) 390 (1851) recognized that the plaintiff, who was a Marine in the United States Navy, had a cause of action against his commanding officer. The Marine sued on the common law tort of unlawful imprisonment and on the Eighth Amendment provision against cruel and unusual punishment. The Court noted that "the case is one of much delicacy and importance as regards our naval service." The Court in *Dinsman* held that a marine is entitled to recover damages "if they find that the punishment of the plaintiff was in any manner or in any degree increased or aggravated by malice or a vindictive feeling toward him on the part of Captain Wilkes, or by a disposition to oppress him. . . ." 53 U.S. at 430.[31]

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prived him of his constitutional rights guaranteed to him under the First and Fourteenth Amendments to the Constitution, his complaint cannot be dismissed for lack of jurisdiction." 352 F. Supp. at 440.

[31] The petitioners make the point that essentially every court of appeal that has decided the issue has held that a serviceman cannot sue his superior officer for damages for a constitutional violation. (Pet. Brief, pp. 14-15). They cite 14 cases for that proposition. But most of those cases involved the application of *Feres* to suits between military members involving medical malpractice or negligent actions. *Rotko* v. *Abrams*, 338 F. Supp. 46, 48 (D.Conn. 1971), *aff'd.* 455 F.2d 992 (2nd Cir. 1972) (medical malpractice); *Laswell* v. *Brown*, 638 F.2d 261, 268-9 (8th Cir. 1982) *cert. pending* No. 82-5574 (October 19, 1982) (malpractice action); *Bailey* v. *DeQuevedo*, 375 F.2d 298, (3rd Cir. 1967) *cert. denied*, 389 U.S. 923 (1967) (action by

Historical precedent from common law establishes that enlisted personnel may sue their commanding officer for wanton or oppressive violations of their rights. Actions by officers or soldiers have been allowed for unauthorized arrest and imprisonment by their superior officers in England. *Hannaford* v. *Hunn*, 172 Eng. Rpts. 68 (1825); *Warden* v. *Bailey*, 128 Eng. Rpts. 253 (1811). The essential element is that the defendant officers acted upon malicious intent or in bad faith by exceeding the proper scope of military authority. *Wall* v. *MacNamara*, 1 Term 536 (1779); *Swinton* v. *Molloy*, 1 T.R. 536-7; *Mostyn* v. *Fabriges*, Cowp. 161.

"Actions of trespass for injuries to the person have been frequently brought and sustained in the common law courts of England, against naval as well as military commanders, by their subordinates, for acts done at home and abroad, under pretense and color of naval and military discipline." *Wilson* v. *Mackenzie*, 7 Hill (N.Y.) 95 (1845).

Also, a valid cause of action is stated for the act of instituting false and malicious charges by a superior military officer against his subordinates. *Cobbett's case*—Opinion of Law Officers, London (1809) in Winthrop, *Military Law and Precedents*, (2nd Ed. 1896); *Harwood* v. *Green*, 3 C.P. 141.

Actions for damages by military personnel have been allowed against superior officers who have inflicted illegal or

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enlisted man against Army surgeon for malpractice); *Misko* v. *United States*, 453 F. Supp. 513 (D.D.C. 1978) *aff'd.* 593 F.2d 1371 (1978) (hospitalized and drugged against his will); *Roach* v. *Shields*, 371 F. Supp. 1392 (E.D. Pa. 1974) *aff'd.* 504 F.2d 1093 (3rd Cir. 1974) (action by active duty member against Navy Doctor for malpractice); *Bailey* v. *Van Buskirk*, 345 F.2d 298 (9th Cir. 1965) (no cause of action for malpractice by Army surgeon when sued by enlisted man); while the others involve only negligence. *Hass* v. *United States*, 518 F.2d 1138, (14th Cir. 1975); *Sigler* v. *LeVan*, 485 F. Supp. 185 (D. Md. 1980); *Calhoun* v. *United States*, 604 F.2d 647 (9th Cir. 1979); *Thornwell* v. *United States*, 471 F. Supp. 344 (D.D.C. 1979).

excessive punishment (flogging) on their inferiors. *Grant* v. *Shard*, 4 Taunt, 84; *Warden* v. *Bailey, supra; Joseph Wall*, 28 Howell, S.T. 51; *Frye* v. *Sir Chaloner Ogle*, 1 McArthur on Courts Martial, 268 (4th Ed.). The Chief Justice, Sir John Willes, stated as to the action of military officers trying to impose illegal punishment: "whoever get themselves up in opposition to the laws, or think themselves above the law, will in the end find themselves mistaken." See 1 McArthur, 436 cited with approval in *Wilson* v. *Mackenzie*, 7 Hill, 95.

Winthrop in his treatise on *Military Law and Precedents* cites no less than thirty cases for the proposition of suits by military personnel against the superior officers for illegal arrests, imprisonment, illegal punishment, unjustified violence and making false charges. See pages 1378-1382. In addition, see *Mallory* v. *Merrit*, 17 Conn. 177 and *Frier* v. *Marshall*, 4 Fost. & Fin. 485.

1. Once a cause of action is established under *Bivens*, plaintiffs should have a right to damages.

Finally, there is the question of a judicial remedy for violation of the Constitutional right to equal protection. This Court in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 395 (1971) held "that damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials. . . ." Damages are the usual remedy for any violation of an individual's right to life or liberty. *Davis* v. *Passman*, 442 U.S. 228, 246. And in *Carlson* v. *Green*, 446 U.S. 14, 18 (1980), this Court stated "that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right." See Katz, *The Jurisprudence of Remedies, Constitutional Legality and the Law of Torts*, 117 U. Pa. L. Rev. 1, 40 (1968).

In the case of Black enlisted personnel, the right to collect damages for violation of their rights to be free of racial discrimination and the badge of inferiority is even greater. The tremendous oppression and degradation faced by the respon-

dents and other Black enlisted personnel can only be partly repaid by a money judgment. It is folly to believe that a human being's self-respect or loss of dignity can be rectified through monetary compensation alone. But more important is the deterrent effect that such awards will have on naval officers who use their position to oppress and violate rights of Black enlisted personnel. This is what the remedy in *Bivens*, *Davis*, and *Carlson* is intended to do. *The limits of Implied Constitutional Damage Actions: New Boundaries for Bivens*. 55 N.Y.U.L. Rev. 1238, 1253 (1980).

In one of the most important decisions involving racial discrimination by a superior officer against a Black enlisted personnel in the military, the Court of Appeals for the Eighth Circuit affirmed the lower court's decision and held:

> "If plaintiff has proved that she lost her recruiter position as a result of deliberate racial discrimination, does she have a judicial remedy? In a society where few policies are as deeply rooted in constitutional jurisprudence as the prohibition against racial discrimination the answer must be yes." *Taylor* v. *Jones*, 653 F.2d 1193, 1200.

The racial discrimination in this case mandates that the respondents be allowed to make their superiors accountable for their actions in contravention of the Constitution. Whether it is damages, injunctive relief or declaratory judgment, this court must allow remedies to the respondents for the violation of their constitutional rights. The conduct of the petitioners in using racial factors in denying respondents skilled ratings, promotions, transfers, rotation, training, honorable discharges, by unfair punishment, in making verbal threats of violence, and by refusing to end the actions of known Ku Klux Klan sympathizers on the U.S.S. Decator all attest to the need to recognize the damage remedy of *Bivens* for Black enlisted personnel.[32]

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[32] Some of the previous English authorities have awarded damages to plaintiff soldiers or sailors against their commanders for violation of their personal liberties. *Hannaford* v. *Hunn*, 172 Eng.Rpts. 68

A cause of action under *Bivens* can be defeated in only two situations. The first is when defendants can show "special factors counseling hesitation in the absence of affirmative action by Congress." 403 U.S. at 346. The second is when defendants can prove "that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed equally as effective." *Carlson* v. *Green*, 446 U.S. 14, 18.

D. In This Case The Petitioners Can Show No Special Factors Counseling Hesitation Or Express Remedies Provided By Congress

Members of Congress (outside official proceedings), federal prison officials, and federal police officials derive their authority and status from a constitutional scheme that affords constitutional remedies to persons whose rights are violated under color of that authority. Legislators, police, and prison officials must obey the law, as must the common folk. *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388; *Davis* v. *Passman*, 442 U.S. 228; *Carlson* v. *Green*, 446 U.S. 14. "Moreover, even if requiring them to defend respondent's suit might inhibit their efforts to perform their official duties, the qualified immunity accorded them under *Butz* v. *Economou*, 438 U.S. 478 (1978) provides adequate protection." *Carlson* v. *Green*, 446 U.S. at 19.

1. The petitioners do not show that there are special factors counseling hesitation.

The military officers here are not of such independent status as the Congressman in *Davis*. They are more on the level of the police officials in *Bivens* or the prison officials in *Carlson* whose duty is to protect national interests. Petitioners have the same

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(plaintiff recovered £300 damages); *Wall* v. *McNamara*, 1 Term. 536 (plaintiff awarded £1000 damages); *Frye* v. *Sir Chaloner Ogle*, *supra*, (plaintiff awarded £1000 against head of court).

type of constitutional status as the defendants in *Butz* v. *Economou, supra*, and therefore, they are not entitled to be protected for their racial discriminatory actions against Black enlisted men.

First, the petitioners correctly stated that a general jurisdictional statute, particularly 28 U.S.C. 1331, is a "sufficient basis for an implied damages remedy because damages as a 'remedial mechanism [are] available in the federal courts'." (Pet. Brief at 12). But they then go on to state that the remedy for constitutional violations of enlisted personnel by their superior officers should not be granted to enlisted personnel because of the special relationship of a soldier to his superiors which are special factors counseling hesitation.

But the courts cannot grant exceptions to a general jurisdictional statute passed by Congress. Congress gave all persons the right to file suits in federal district courts under 28 U.S.C. 1331 for actions arising under the Constitution, laws or treaties of the United States. It is for Congress to carve out exceptions, not the federal courts. It would be a violation of the separation of powers doctrine for the court to attempt to increase or decrease its own jurisdiction under 28 U.S.C. 1331. Article I, Section 1 of the United States Constitution vests all legislative power in the Congress of the United States. Article III, Section 2 provides that the "judicial power shall extend to *all cases*, in Law and Equity arising under the Constitution, the Laws of the United States, and Treaties made, or which should be made under their authority." In *Ex Parte McCardle*, 74 U.S. (7 Wall) 506 (1869) this Court held that Congressional power under the Constitution in excepting federal jurisdiction from the federal courts can only be examined by the Supreme Court to test its constitutionality. The Court cannot alter, by adding to or taking away from, the jurisdictional exceptions of Congress.

The petitioners here are asking this Court to violate Article I by legislating an exception to the general jurisdictional statute to exclude service personnel. This the Court does not have jurisdiction to do.

But second, they are asking the Court to violate Article III by refusing to hear valid disputes arising under the law and Constitution, particularly disputes of racial discrimination brought under 28 U.S.C. § 1331, and the Equal Protection Clause. This the Court should refuse to do.

The petitioners further argue that allowing enlisted personnel to sue his (her) superiors will interfere with the special relationship of a sailor to his (her) superior for other reasons.

It will interfere with military discipline and the command relationship. It will cause commanders to hesitate before issuing orders because of their fear of personnel liability. They go on to say the comprehensive regimentation gives rise to constant complaints of unfairness, and possible suits. Finally, they argue that the military "habit of automatic obedience" will be interfered with. (Pet. Brief, 27)

The concept of military discipline as argued by the petitioners is a concept officially discarded in the military system. Authoritative discipline as an automatic, unquestioning and final obedience is the product of rigid adherence to rules, regularity, subordination and devotion. It is a product of the feudal mentality that was copied by the Prussian, English, early American and Southern United States military apparatus. It is based upon the caste system where the landed aristocracy is the officer corps and the peasantry is the rank and file. Morris Janowitz, *The Professional Soldier* (1960) 35-37.

In the United States Army and Navy there had been a trend away from this authoritative approach and a leaning toward the managerial approach of leadership in the military since 1905. This is necessitated by the fact that the social composition of enlisted personnel being more of citizen-soldiers who are used to democratic procedures. The positive techniques used to insure discipline are emphasized: interest in the well-being of the solider, competence of leadership, and the inculcation of confidence and self-reliance. Captain M. B. Stewart,

The Army as a Factor in the Upbuilding of Society, Journal of the Military Service Institute (1905) 391-404.

The modern military is faced with the managerial dilemma between military discipline and democratic political process. And military discipline can only be justified because of its importance to the violence of war. The basic concept in officer-enlisted relationship is initiative, psychology and morale. Janowitz, *supra* at 39-45.

As a result of the abuses that enlisted men suffered at the hands of their officers during World War II, a special board (Doolittle Board) was established by the War Department in 1946 to make findings and recommendations. One of its more important recommendations was that "There is need for a new philosophy in the military order, a policy of treatment of men, especially in the ranks in terms of advanced concepts of social thinking. The present system does not permit full recognition of the dignities of men. More definite protection from the arbitrary acts of superiors is needed." Report of The Secretary of War's Board on Officer-Enlisted Relationships (Doolittle Report) (1946) para. III.

All of the military academys have shifted their approach from the so-called "heroic" orientation of discipline which stressed authoritarian, blind discipline to the managerial orientation. "The combat-model leadership in which a quality example is offered and unhestitating unquestioned obedience is demanded, will become more and more rare. Effective leadership will be increasingly predicated upon respect for job knowledge and competence accompanied by the ability to offer sound, rational reasons for the course of action required. The enlistment of voluntary eager cooperation will be the mark of the leader of the future, rather than the use of fear as a goal to performance. Air Force Academy, Draft of 15 Year Plan, January 7, 1970 in L.I. Radway, *Recent Trends at American Service Academies*, in Charles C. Moskos, Jr., *Public Opinion and The Military Establishment* (1971) 27-28.

The necessity of providing good leadership is necessary to insure that the morale and discipline of the troops are high. Nothing lowers discipline more than does a low morale. Poor leadership is the most common cause of low morale and a dissippated discipline. Lt. A.W. Lane, *The Attainment of Military Discipline*, *Journal of Military Service Institute*, (1944) 1-19. Janowitz, *supra* at 39; Doolittle Report, *supra*, at Section II, F, 3.

The effect of racism on the Black enlisted destroys discipline and the special relationship of enlisted personnel to their commanding officer. It lowers their morale and it also prohibits effective obedience of the Black enlisted to the orders of their superior officer.

So the special relationship which is necessary for the military to exist is destroyed or weakened by the individual, as well as the institutionalized racism practiced by some individual commanding officers. "There can be no real and lasting discipline for American servicemen that does not rest upon a fair and just administration of our laws . . . There is no room for discrimination, unfair treatment, by or upon any groups or individuals." *Task Force Report*, *reprinted* in MacGregor & Nalty, *supra*, Vol. XIII, 484-485.

Once the superior officer destroys the special relationship, the bringing of a lawsuit to enjoin discriminatory practices, to require the commander to follow his naval regulations prohibiting unequal treatment, or for damages for his discriminatory action will not destroy a relationship that has already been subverted by racism. It will in effect require the commander to respect the constitutional rights of the Black enlisted men. If he changes, the commander will be a more trusted, respected and professional leader.

In addition, the petitioners are arguing for a return to the Prussian type of absolute discipline. It may be the method of commanding troops of a few "heroic" commanders, but it is not the present policy of the Pentagon or the officer corps in today's military. So, the petitioners' position that this type of

discipline will be interfered with is unfounded. There will be no interference because this type of discipline does not exist. The managerial method of instilling discipline recognizes the reciprocal rights and duties of enlisted. It will not be hampered by lawsuits because it is based on a rational approach toward human beings and not a totalitarian approach.

But most important, the concept of military discipline is merely a shorthand description for what is an equilibrium of forces. The notion that discipline can exist in the context of blind obedience to commands issued by an officer corps unburdened by an effective obligation to respect the fundamental constitutional rights of enlisted personnel is refuted by the history of revolts in the ranks where official denial of such rights has occurred.

The effects of racial discrimination and feelings of inferiority caused by the acts of superior officers toward Blacks has already been the cause of serious breakdowns in discipline of the Black enlisted personnel. Acts of prejudice and racial hatred caused by white officers deeply affect any personal relationship developed between a sailor and his commander. The massive racial discrimination by commanders in the Navy and armed services has caused massive discontent that occurs in the face of denial of constitional rights of service personnel.[33]

One of the most notorious ruptures occurred as a result of the violence perpetrated against Black prisoners at the stockade at Fort Bragg, North Carolina on June 23, 1968 when 238 inmates sezied the stockade and held it for three days. The immediate cause of the uprising was that Private Johnson, a Black, was physically hosed down with a fire hose by order of the commandant of the prison, a white major, then set upon by the noncommissioned officer guards who violently beat him. Private Johnson had been in solitary confinement for 78 days prior to the riot because "he had dared to fight back when the comman-

[33] Cong. Rec. at 36853

dant of the prison, a major, had spit in his face and taunted him."[34]

On October 14, 1968, twenty-seven young soldiers at the army stockade, Presidio Army Base, San Francisco, California, sat down to protest (1) the brutal slaying of one of the prisoners by a guard, (2) the terrible oppressive conditions at the stockade including physical beatings, threats of violence and physical intimidation by the guards, and (3) the lack of response to their complaints that were made to the Army officer in the stockade.[35]

Another massive rupture following gross denial of rights occurred on June 5, 1969 when more than 150 soldiers in the Fort Dix stockade, New Jersey, rebelled. The Congressional investigation found that it was caused by beatings by guards, failure to give medical care to the injured and sick, inhumane food, and the most degrading living conditions.[36]

In the spring of 1969, three hundred prisoners at the Fort Ord, California stockade held a sit-down protest against the physical brutality of the guards, the bad living conditions and the short rations.[37]

In 1968, several hundred Black soldiers took over a section of the facility at the Long Binh Jail in Vietnam to protest the racial conditions and physical brutality by the guards, and complicity by the officers.[38]

Also, there were two large racial incidents of Blacks in the Marine Corps as a result of racial discrimination practiced by

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[34] Robert Sherrill, *Military Justice is to Justice as Military Music is to Music* (1970), 200.

[35] Fred Gardner, *Unlawful Concert* (1970).

[36] Sherrill, *supra*, at 201-2.

[37] *Id.* at 205.

[38] *Id.* at 205, New York *Times*, September 4, 1968.

officers and others. One occurred at Camp Lejuene, North Carolina, in July of 1969 and the other in August of 1969 at Koneshe Naval Air Station, Honolulu.[39]

In May, 1981, four days of rioting occurred at Travis Air Force Base, California as a result of racial incidents on the base involving violation of the rights of Black enlisted personnel, and inaction by the officers.[40]

One of the most serious incidents recently involving Black enlisted personnel happened on board the aircraft carrier U.S.S. Kitty Hawk at Subic Bay, Philippines on October 12, 1972. On that day, a riot on the ship by Black enlisted personnel was caused by the orders of the white commanding officer which prohibited Blacks from walking in groups of more than two persons aboard the vessel, and ordering his Marines to enforce the order.[41]

This incident lasted nearly all day and resulted in the injury of 47 men and the court-martial of 21 others.

An even larger racial incident occurred on the aircraft carrier U.S.S. Constellation on November 5, 1972. One hundred twenty-five Black naval enlisted personnel had seized the main mess decks of the vessel to protest the racial command policies and the commanding officer's refusal to meet with them. Their main grievances were the command policy of attempting to discharge six Blacks with less than honorable discharges because they were "agitators"; the non-judicial punishment being given discriminatorily against Blacks, and the dirtiest and most menial jobs on the ship were often given to Blacks.

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[39] Adam Yarmolinsky, *The Military Establishment: Impacts on American Society* (1971), 344.

[40] Gropman, *The Air Force Integrates*, pp. 215-216.

[41] See Report by the Special Subcommittee on Disciplinary Problems in the Navy, of the Committee on Armed Services, House of Representatives, Ninety-Second Congress, Second Session, January 2, 1973, reprinted in MacGregor and Nalty, *supra*, Vol. XIII, 613-616; *Voice & Viewpoint*, November 15, 1972.

The ship had to cease its exercises and return to San Diego. The command partially met the demands of the Blacks.[42]

On November 13, 1976 a protest was staged by Black Marines at Camp Pendleton, Oceanside, California. The Ku Klux Klan had been openly operating on the Marine Corps Base for nearly one year and were burning crosses, beating and threatening Blacks, and distributing anti-Black literature. Various officers of the First Force Surface Battalion knew of the operation of the Klan and knew of the complaints of Black Marines requesting that they stop the Klan. But the officers refused to take any action. The protest resulted, causing the court martial of fourteen Black Marines. The command finally removed the members of the Ku Klux Klan from the base.[43] *United States* v. *Matthews*, 7 MLR 2336 (NCMR 1979).

The cause of military discipline is aided and not hindered by an effective means of enforcing constitutional rights among enlisted personnel concomitant to that in the hands of the officer corps to enforce violations of its orders. Military power is not absolute and the law must protect the personal rights and liberties of the enlisted by limiting the absolute power of the commander. Lane, *supra*, 1-19.

Lastly, the position of the petitioners that the special relationship of the enlisted person to his (her) superior is a special factor counseling hesitation and preventing a damage action would place Blacks in the military in a unique position. They would be similarly situated to that held by Black masses after the infamous decision of *Dred Scott* v. *Sanford*, 60 U.S. (19 How.) 393, 426 (1856). Like Dred Scott, the Black enlisted person would not be entitled to sue in the courts even though

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[42] See MacGregor and Nalty, *supra*, Vol. XIII, 616-618; San Diego Committee, *Turning the Regs Around* (1974), 31-32; Robert W. Mullen, *Blacks in America's Wars: The Shift in Attitudes From the Revolutionary War to Vietnam* (1973); Los Angeles *Times*, November 8, 1972.

[43] Los Angeles *Times*, November 15, 1976.

his (her) rights were violated. This would set Black people back over one hundred years to the time before the Thirteenth and Fourteenth Amendments. It would impose a badge of slavery upon them of the rights under these Amendments and the federal statutes.

Surely the petitioners cannot be asking the court to place this type of badge of infamy upon Blacks.

The petitioners can point to no authority for the proposition that bringing an action to enforce one's constitutional rights will cause a serious breakdown of the command-enlisted relationship and will make commanders hesitate before issuing orders. The numerous lawsuits instituted during the Vietnam War era and afterwards for matters from issues of hair-cut regulation to issues of court-martial jurisdiction have not interfered with the command-enlisted relationship. To believe that this remedy would suddenly cause a breakdown of the command-enlisted relationship is unfounded and strains one's credibility.

2. The petitioners have not shown that Congress has provided an alternative remedy which it explicitly declared should be a substitute for recovery under the Constitution and viewed as equally effective.

Federal courts may not deny a remedy under *Bivens* unless the petitioners show an explicit Congressional declaration that persons injured by federal officials may not recover money damages from those officials. "Also, there must be another remedy, equally effective in the view of Congress." *Carlson* v. *Green*, 446 U.S. at 20.

In addition, a *Bivens* action is deemed more effective than most statutory remedies. (1) It serves as a deterrent effect on individual violations of the Constitution by allowing recovery against the individual. (2) It allows punitive damages which are especially appropriate to redress violations by federal officials. (3) It allows jury trials. (4) It allows the action to be governed by uniform rules of conduct. *Carlson* v. *Green*, 446 U.S. at 21-22.

The petitioners are never able to show that Congress expressly provided that Black enlisted personnel injured by violations of their right to equal protection have another remedy at law.

First, the petitioners rely on *Feres* v. *United States*, 340 U.S. 135 (1950) and its progeny for the principle that since the Courts have held that the Federal Tort Claims Act does not permit the servicemen to sue the United States for service-related injuries, it should not be allowed for constitutional violations. (Pet. Brief, pp. 16-17) But the *Feres* doctrine only applies to suits for negligence by one service personnel against another. It does not apply to intentional torts. This Court cited *Dinsman* v. *Wilkes*, 12 How. 390 in Footnote 10 of *Feres* for that proposition. *Feres* v. *United States*, 340 U.S. at 141. Nor does *Feres* apply to constitutional violations.

This Court in *Feres* listed three factors for its ruling. First, the relationship between the government and members of the armed forces is distinctively federal in character. But the peculiar federal character of the armed forces or of federal employment is no longer a viable reason for immunizing federal officials. *Davis* v. *Passman*, 442 U.S. 228; *Carlson* v. *Green*, 446 U.S. 14.

Next, the Court stated that Congress passed a series of enactments giving compensation for injuries or death to members of the armed forces on a no-fault basis. But no such scheme exists for intentional injuries or constitutional violations. Veterans benefits, like worker's compensation, do not provide relief for intentional injuries against employees. See AA Larson, *Law of Worker's Compensation*, Section 68 (1976).

The last rationale for *Feres* was that it would be unfair to subject members of the military to different standards of care based on the law of the state where they are stationed. But this requirement of uniformity is not applicable to claims based on the constitution or federal civil rights act.

Also, the *Feres* doctrine is limited by the more recent court cases which held that government officials are not entitled to

an absolute immunity for violation of the constitutional rights of citizens of this country. *Imbler* v. *Pachtman*, 424 U.S. 409 (1976); *Wood* v. *Struckland*, 420 U.S. 308 (1978); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974); *Butz* v. *Economou*, 438 U.S. 478; *Harlow* v. *Fitzgerald*, ___ U.S. ___ 73 L.Ed.2d 404 (1982); *Davis* v. *Passman*, 442 U.S. 228; *Carlson* v. *Green*, 446 U.S. 14.

Next, the petitioners state that the relief available for a court-martial conviction pursuant to habeas corpus jurisdiction is narrower over military criminal procedure then over state criminal procedure because of the demands of discipline and that this justifies not recognizing a damage remedy.

However, the rule in many circuits is that the standard of review in court-martial is the same as that for habeas corpus review of state convictions. *Burns* is interpreted not as having a different standard of review but as deferring to military finding of facts, as is done in petitions for habeas corpus from state proceedings. *Kaufmann* v. *Secretary of the Air Force*, 415 F.2d 991, *supra; Harris* v. *Ciccone*, 417 F.2d 479 (8th Cir. 1969) *cert. denied* 397 U.S. 1078 (1970); *Heilman* v. *United States*, 406 F.2d 1011 (7th Cir. 1968), *cert. denied*, 396 U.S. 860 (1969).

The petitioners then make the bold assertion that habeas corpus review of military administrative decisions is strictly limited and cites *Orloff* v. *Willoughby*, 345 U.S. 83 (1953). Although this Court refused to review the specific duty assignment in *Orloff*, it did review the action of the military to determine if it was acting within the scope of its lawful powers, stating that, "the [draft] statute should be interpreted to obligate the army to clarify specifically inducted professional people with the categories which rendered them liable to induction." 345 U.S. at 86.

Further, the federal courts have reviewed military decisions using the "basis in fact" test which is much narrower than the "acting within lawful powers" test. *Negre* v. *Larsen, consolidated subnom; Gillette* v. *United States*, 401 U.S. 437

(1971); *Hammond* v. *Lenfest*, 398 F.2d 705, 715 (2nd Cir. 1968); *Packard* v. *Rollins*, 422 F.2d 525 (8th Cir. 1970); *Ward* v. *Volpe*, 484 F.2d 1230 (9th Cir. 1973).

But even further this Court has held that the writ of habeas corpus is available to military personnel who claimed to be unlawfully retained in the armed services. *Parisi* v. *Davidson*, 405 U.S. 34. This is similar to relief to any civilians who are unlawfully being held in custody.

In addition, the petitioners allege that injunctive relief is more limited in the military than in the civilian community and cite *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975). But the rule of *Councilman* was adopted from the rule of *Younger* v. *Harris*, 401 U.S. 37 (1971) which essentially prohibited federal court intervention in state criminal proceedings under the maxim that equity will not enjoin a criminal prosecution.

But *Councilman* does not deny a remedy to service personnel, it is merely a question of federal abstention applied to the military.

Injunctive relief and mandamus are available against the military when it violates its own regulations. *Schwartz* v. *Covington*, 341 F.2d 537 (9th Cir. 1965); *Mela* v. *Calloway*, 2 M.L.R. 2217 (S.D. N.Y. 1974); *Crawley* v. *United States*, 338 F. Supp. 981 (E.D. Wis. 1974); *Smith* v. *Resor*, 406 F.2d 141 (2nd Cir. 1968).

The argument of the petitioners that the normal remedies of damages, injunction or habeas corpus which the courts and Congress usually provide have either not been available or are only of limited availability to military personnel and justify denial of a damage remedy for constitutional violations is without merit.

The petitioners next argue that Congress has specifically provided rememdies for service personnel with grievances like the petitioners under 10 U.S.C. 1552(a)—the Board for the Correction of Naval Records; under 10 U.S.C. 138—filing for a redress of grievances committed by one's commanding officer

and under the naval regulations prohibiting naval racial discrimination.

First, these internal military schemes proposed by the petitioners do not provide any compensatory damage to a service member. No damages can be awarded under 10 U.S.C. 938, nor can the Board for the Correction of Naval Records (BCNR) award any damages, except back pay. This Court in *Carlson* stated that a suit under the Federal Torts Claims Act is not an alternative remedy to a *Bivens* action for the wrongful death of a prisoner, even though it provides compensatory damage. *Carlson* v. *Green*, 446 U.S. at 21.

But there is not the slightest glimmer of any legislative intent that these remedies were intended by Congress to be a substitute for a *Bivens* remedy. The purpose of the creation of the BCNR by Congress was for "avoiding a large number of 'private' bills in Congress by which discharged servicemen sought to have the nature or character or type of discharge certificate corrected . . ." *Suro* v. *Padilla*, 441 F. Supp. 14, 18 (D.R.R. 1976). The act was also intended to correct an individual's service record for errors resulting from military court-martials or Boards of Review and to provide compensation for such errors. *Larinoff* v. *United States*, 365 F. Supp. 140 (D.C. Cir. 1973), *rev. other grounds*, 533 F.2d 1167 (D.C. Cir. 1974), *aff'd.* 431 U.S. 864 (1977). The courts have held that there is no Congressional intention by creating BCNR "that judicial jurisdiction would be affected . . . or to preclude judicial review as authorized by previous court decisions." *Ogden* v. *Zuckert*, 298 F.2d 312, 315 (D.C. Cir. 1961); *Sohm* v. *Fouler*, 365 F.2d 915 (D.C. Cir. 1966); *Seepe* v. *Department of the Navy*, 518 F.2d 760 (6th Cir. 1975).

Even more important, the Board for the Correction of Naval Records does not provide an adequate remedy for constitutional claims of enlisted personnel. Limited financial and personnel resources result in the BCNR ". . . being totally inept at handling with fairness questions such as those raised . . . [involving the Fifth Amendment rights of a Black air-

woman]." *Rew* v. *Ward*, 402 F. Supp. 331, 336 (N.D. N.M. 1975); *Matlovich* v. *Secretary of the Air Force*, 591 F.2d 852 (D.C. 1978). The long delays and the inadequacy of remedies have led many courts to hold that application to the BCNR is no longer a necessary requirement prior to seeking federal court relief for unlawful military administrative or military judicial action. *Vance* v. *United States*, 434 F.Supp. 826 (D.C. Texas 1977); *Odgen* v. *Zuckert*, 298 F.2d 312; *Craycroft* v. *Ferrall*, 397 U.S. 335 (1970); *Parisi* v. *Davidson*, 405 U.S. 34, 38 at fn. 3.

But even more important, the law in this area is that it is not necessary for a member of the military to appear before the BCNR or an administrative agency when constitutional issues are involved. *Beller* v. *Middendorf*, 632 F.2d 788, 801 (9th Cir. 1981), *cert. denied*, 454 U.S. 855 (1982); *Downen* v. *Warner*, 481 F.2d 642 (9th Cir. 1973). It is quite clear to this Court that military boards "as an institution are singularly inept in dealing with the nice subtleties of constitutional law." *O'Callahan* v. *Parker*, 395 U.S. 258, 265. A party need not apply to the BCNR if the relief requested is not within the authority or power of that body. *Hodges* v. *Calloway*, 499 F.2d 417, 420-21 (5th Cir. 1974); *Van Hoffburg* v. *Alexander*, 615 F.2d 633, 640 (5th Cir. 1980).

Finally, Article 138 of the Uniform Code of Military Justice (10 U.S.C. 938) is subject to the same deficiencies as are appeals to the BCNR. But further, it provides no relief for the violation of equal protection and can provide no remedy. *Casey* v. *Schlesinger*, 382 F. Supp. 1218, 1220 (D. Ok. 1974). Further, it only applies to one's commanding officer, which in this case would be petitioner Chappell. None of the other petitioners are covered by Article 138.

But these sections as well as the naval regulations concerning equal opportunity are not equally effective alternative remedies to *Bivens*. The internal remedies will not have any deterrent effect on the petitioners. BCNR procedures do not serve any deterrent effect. They only change incorrect records or reports. Article 138 could have a deterrent effect on one's

commanding officer. But it is highly unlikely that any superior officer reviewing a claim under Article 138 would find for an enlisted man against a fellow officer on an issue of racial discrimination or any other grievance. As general rule, the military chain of command does not operate in that fashion. It functions to uphold the decisions of commanders regardless of their racial impact or discriminatory purpose.

Here again, the federal courts are in a better position to consider the constitutional issues presented than are the remedies under Article 138 referred to by the petitioners. *Committee For GI Rights* v. *Calloway*, 518 F.2d 466, 475.

It is unfortunate but true that the history of race relations in the military is not a matter which can be looked upon with pride. Particularly in the Naval Service, racial prejudice is rampant. And, even when the Navy was directed by the President to increase Black enlistments in 1941, the naval hierarchy itself resisted. What is most significant, however, is that senior officers deemed it to be contrary to "the best interest of general ship efficiency" and "the national defense" to allow Blacks to serve in other than the messman branch. Memorandum from the Chief of the Bureau of Navigation to the Chief of Naval Operations, October 24, 1941 reprinted in MacGregor & Nalty, *supra*, at 11. Of course, in a few short years Blacks were placed in many job titles and integrated into the Navy without any threat to national security or the national interest.

That senior naval officials could perceive that basic steps toward equal treatment of Blacks as a threat to national security is shocking. More troubling, however, is that this perception was apparently sincere and honest. In rather graphic fashion, this demonstrates the unsuitability of entrusting enforcement of basic constitutional provisions to military officials whose perceptions are shaped by their short range problems. Officials need not be degenerate in order to ignore express and fundamental constitutional requirements; they need only have ther outlook limited by their immediate concerns.

But even more important the racial discrimination in the Navy is so pervasive that as late as 1970 Admiral E. Zumwalt, then Chief of Naval Personnel, in speaking of the racial problems in the Navy, was able to say:

> From this group of Black navy men and their wives we learned of discrimination of an order that we had no idea existed . . . We didn't even understand the nature or basis for some of it until we listened to this group. Since then I have seen the transformation not only in myself, but in all those senior personnel who were in the room on that occasion. J.D. Foner, *Blacks and the Military in American History*, 239 (1974).

There can be no doubt that equality of treatment for persons of all races is and has been a fundamental and overriding tenet of our nation. At the same time, the vestiges of discrimination have proven to be particularly resistant and difficult to eliminate. Even if the government's position of complete unaccountability of military officers were not legally unprecedented, claims of racial discrimination would be the most inappropriate area to relegate solely to the internal military system for redress. Although many types of claims may be readily resolvable by the military command, those involving fundamental constitutional provisions, the importance of which are not inherently apparent to those immersed in day-to-day military activities, are particularly ill-suited to final resolution in that forum.[44]

In the final analysis, the government's sweeping claim of absolute unaccountability—no matter how egregious the wrongful conduct of the individual officer, no matter how fun-

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[44] The Black Congressional Caucus in its report on Racism in the Military, found that "formal charges of racial prejudice and discrimination invariably wind up with a whitewash by the serviceman's superiors and a black mark in the victim's military folder. The military probably to a greater extent than any other American institution has built in numerous devices and practices to protect itself from internal and external tremors." Cong. Rec. at 36583.

damental the constitutional violation, no matter how serious or widespread the injury inflicted—is simply unacceptable. Although the government is correct in urging that there is a separation of powers issue implicit in this case, it has incorrectly characterized that issue: the threat is not of the judiciary undermining the military "branch" but rather of the military attempting to extricate itself from the system of checks and balances and eviscerating fundamental constitutional tenets because of an overbroad and unjustified conception of military necessity. If military officers are unchecked by judicial authority, the large scale, systematic violations of the Constitution such as those witnessed in the past are almost certain to recur.

In closing this point, it must be remembered that the equal protection rights of Black enlisted personnel to be free from racial discrimination by their superior officers is a paramount policy of the Constitution. This Court must recognize the right of Blacks to enforce these rights against racist commanders who degrade and demean members of the Black race. Anything less will deny a large group of citizens the rights that they were entitled to by the Constitution and will encourage the resort to self-help to vindicate and to protect themselves from the racial policies of their officers.

E. Black Enlisted Personnel Also Have A Cause Of Action For Damages Against Their Superior Officers Under 42 U.S.C. Section 1985(3).

The respondents also raise a valid cause of action under 42 U.S.C. 1985(3) by alleging in their complaint that the petitioners have conspired to deprive them of rights to skilled rates, honorable discharges, promotions, and their right to be free of racial discrimination guaranteed by the equal protection clause and by the naval regulations (J.A. 3, 8, 10, 12, 14 and 16)

Originally passed in 1871, the Civil Rights Act, also known as the Ku Klux Klan Act, was specifically aimed at state officials and members of the Ku Klux Klan who had terrorized Black people. Congress, in passing this legislation, relied primarily upon the Thirteenth Amendment.

In *Griffin* v. *Breckenridge*, 403 U.S. 88, this Court held that the Civil Rights Act of 1871 [42 U.S.C. 1985(3)] was restricted to conspiracies by persons acting under color of law, as well as private conspiracies, that were directed against Black people and that were the result of racial prejudice. Only conspiracies that violated rights protected under the equal protection clause were covered.

Federal officials can be sued under 1985(3) for violations of equal protection by racially discriminatory acts. *Dry Creek Lodge, Inc.* v. *United States*, 515 F.2d 926, 931; *Revis* v. *Laird*, 391 F. Supp. 1133 (E.D. Cal. 1975).

Military officers may also be sued under the Civil Rights Act for racial discrimination. *Taylor* v. *Jones*, 653 F.2d 1193 (8th Cir. 1981); *Alvarez* v. *Wilson*, 431 F. Supp. 136, *supra*. The Civil Rights Act, "is a source of statutory protection against racial or ethnic discrimination that is apparently available to uniformed military personnel." Harris, *Protections Against Discrimination Afforded to Uniformed Military Personnel: Sources and Directions*, 46 Mo. L. Rev. 265, 286 (1981).

A person who is made to suffer racial discrimination is deprived of a basic statutory right. Racially discriminatory acts by military officers do not further any military purpose. They only manifest a policy of racial superiority which has no place in the command of the Navy.

When Congress passed this act in 1871, it extended to all Black persons. Black enlisted people in the military, like all other United States citizens, have the right to be free from conspiracies of their superior officers against them, that are motivated by racial prejudice.

The petitioners fail to object to this ground of federal court jurisdiction. So it can be assumed, since it was one of the bases for federal court jurisdiction in this case, that they do not oppose it.

But assuming they raise the same arguments as they do to the *Bivens* remedy, the same countervailing arguments do apply.

Likewise, the respondents have a valid claim under the rubric that a military department that issues valid regulations must abide by such regulations. *Nixon* v. *Secretary of the Navy*, 422 F.2d 934 (2nd Cir. 1970); *Peavy* v. *Warner*, 493 F.2d 748, 750 (5th Cir. 1974); *Denton* v. *Secretary of the Air Force*, 483 F.2d 21, 28 (9th Cir. 1973). Here, the Navy promulgated valid regulations ensuring equality of opportunity and treatment for all military personnel of the Department of the Navy, regardless of race. OPNAV Instruction 5354.1a. But the respondents were never afforded equality of opportunity and treatment by petitioners. Therefore, respondents also state a valid claim for declaratory relief because of the failure of these Naval officials to follow their own regulations.

In conclusion, this Court should recognize that respondents have stated a valid cause of action for racial discrimination under the equal protection component of Due Process, under 42 U.S.C. 1985(3) and under Due Process for violation by naval officials of their own regulations prohibiting racial discrimination by their superior officers.

This Court should affirm the decision of the Court of Appeals and return the case to the federal district courts to review the constitutional claims under the doctrine of reviewability as set forth in *Mindes* v. *Seaman*, 453 F.2d 197, and to review the claims arising under 42 U.S.C. 1985(3) and naval regulations on the merits.

POINT II

A UNITED STATES DISTRICT COURT HAS JURISDICTION TO REVIEW THE VIOLATIONS OF FIFTH AMENDMENT RIGHTS, OF 42 U.S.C. 1985(3), AND OF NAVAL REGULATIONS PROHIBITING RACIAL DISCRIMINATION AGAINST BLACK ENLISTED PERSONNEL BY THEIR SUPERIOR OFFICERS

The Court of Appeal below provided a test to reconcile the problem of reviewing internal military decisions where the plaintiff is alleging a violation of his (her) rights under the

Constitution. The federal district court must first determine whether the action complained of within the military violates the Constitution, and whether the plaintiff has exhausted his or her military remedies. (Pet. App. 7a)

The trial court must then balance four factors to determine whether review on the merits should be granted. The strength of plaintiff's claim, and the potential injury if review is refused, must be balanced against the extent of interference with military functions and the military expertise involved. If the factors are balanced for the plaintiff, the court will move to the merits. (Pet. App. 7a)

This Court is requested to adopt this test because it insures that federal courts will review violations of recognized constitutional rights by military officials, protect individual liberties, and insure that unfounded claims against the military will be eliminated prior to a decision on the merits. Federal courts are often called upon to decide questions of internal military affairs. This method insures orderly processing of these claims. Many of the circuits have adopted the *Mindes* factors cited by the Court of Appeal. It is the most deliberate judicial examination of the subject to this time.[45]

A. Federal Courts Have Power To Review Military Administrative Action For Violation Of Statutory Rights Prohibiting Racial Discrimination.

> "But the Pentagon is not yet sovereign. The Military is simply another administrative agency insofar as judicial review is concerned." *Parisi* v. *Davidson*, 405 U.S. 34, 52 (1972) (concurring opinion of Justice Douglas).

The federal courts have power to grant relief to the action of a federal executive official where the department has exceeded

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[45] Peck, *The Justices and The Generals: The Supreme Court and Judicial Review of Military Activities*, 70 *Military Law Review*, 1 (Fall, 1975). (Report of a high military official in the Pentagon whose belief is that the military is subject to the Constitution).

its statutory authority. *American School of Magnetic Hearing* v. *McAnnulty*, 187 U.S. 94. The interpretation by executive officials of Acts of Congress do not bind the federal courts from reviewing that interpretation or action taken pursuant to that interpretation.

This Court initially reviewed military administrative action taken pursuant to an act of Congress only to determine whether the "military tribunal was acting within the scope of its lawful powers." *Reaves* v. *Ainsworth*, 219 U.S. 296, 304 (1911). Federal courts originally did not review the factual basis for the military action. *United States ex rel. French* v. *Week*, 259 U.S. 336 (1922).

From the earliest this Court ruled that action of the military in inducting and discharging armed services personnel in contravention of a statute could be reviewed because "the case involves the construction of the general statutes of the United States." *Denby* v. *Berry*, 263 U.S. 29, 31 (1923); *Patterson* v. *Lamb*, 329 U.S. 539, 542 (1947); *Billings* v. *Truesdale*, 321 U.S. 542 (1944).

When the military acts within its statutory authority to deny a service personnel an assignment, the federal courts normally do not review such action. But where the military denies a person in the military a particular assignment in violation of a statute, the court does have power to review the action. *Orloff* v. *Willoughby*, 345 U.S. 83, 93-94.

Also in *Harmon* v. *Brucker*, 355 U.S. 579, this Court held that federal courts may review internal military affairs to determine if a military official has acted outside the scope of his powers. This Court stated:

> "Generally, judicial relief is available to one who has been injured by an Act of a governmental official which is in excess of his express or implied powers . . . The District Court not only had jurisdiction . . . but also power to construe the statutes involved to determine whether the respondent did exceed his powers. If he did so, his actions would not constitute exercises of his administrative dis-

> cretion, and, in such circumstances as those before us, judicial relief from this action would be available." *Harmon* v. *Brucker*, 355 U.S. at 581-582.

This Court in the variable reinlistment bonus cases, *United States* v. *Larinoff*, 431 U.S. 864, held that Naval action changing a reinlistment bonus was in conflict with a Congressional statute and invalid.

Federal district courts may also review internal military administrative activities for compliance with due process and equal protection. *Frontiero* v. *Richardson*, 411 U.S. 677, 690; *Schlesinger* v. *Ballard*, 419 U.S. 498.

Courts also have power to review internal military actions to determine whether there was a violation of the Civil Rights Act. In *Taylor* v. *Jones*, 653 F.2d 1193, the court held that plaintiff, a member of the national guard, was entitled to relief under 42 U.S.C. 1981 for the intentional discrimination that she suffered. Also, in *Alvarez* v. *Wilson*, 431 F. Supp. 136, *supra*, the district court held that a federal district court can review actions of naval officers for conspiracy to deprive a Black service personnel equality of his protection rights under 42 U.S.C. 1985(3).

Based on these authorities, this Court should affirm the decision of the Court of Appeal and return this claim under 42 U.S.C. 1985(3) to the United States District Court to review the matter on the merits. The action of the petitioners was in contravention of 42 U.S.C. 1985(3) and the federal courts must review the violation of respondent's rights thereunder.

B. Federal Courts Must Review Naval Administrative Actions For Violations Of Regulations Intended To Protect Black Enlisted Personnel From Racial Discrimination.

Administrative action of the executive department in violation of their own regulations establishing procedures for a hearing and review are invalid. *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954); *Service* v. *Dulles*, 354 U.S. 363, 388 (1957). The head of an executive department

must comply with its own procedural regulations in dismissing an employee. *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959).

"Where the military has laid down its own rules and regulations, such rules and regulations cannot be ignored, and courts may examine the order [of military officers] to ascertain whether the military's rules and regulations were violated in a manner resulting in substantial prejudice." *Hall* v. *Fry*, 509 F.2d 1105, 1110; *United States ex rel. Sledgeski* v. *Commanding Officer*, 478 F.2d 1147 (2nd Cir. 1973); *Kohn* v. *Laird*, 460 F.2d 1318 (7th Cir. 1972). Action by military service taken in violation of its regulations is invalid and void. *Geiger* v. *Brown*, 419 F.2d 714 (D.C. Cir. 1969); *Grimm* v. *Brown*, 449 F.2d 654 (9th Cir. 1971); *Antonik* v. *United States*, 445 F.2d 592 (6th Cir. 1971); *Conn* v. *United States*, 376 F.2d 878 (Cl.Ct. 1967); *Peavy* v. *Warner*, 493 F.2d 748, 750; Lunding, *Judicial Review of Military Administrative Discharges*, 83 Yale Law Rev. 33, 53-6.

Military administrative action which involves violations of regulations, statutes or the Constitution can be reviewed by federal courts even though they involve duty assignments. *Committee for GI Rights* v. *Calloway*, 518 F.2d 466 (duty assignment at rehabilitation center); *Hall* v. *Fry*, 509 F.2d 1105 (active duty assignment for reservists); *Moore* v. *Schlesinger*, 3 MLR 2637, 2638 (10th Cir. 1975) (military actions denying fundamental rights resulting in job transfer); *Hagopian* v. *Knowlton*, 470 F.2d 201 (due process right to hearing required prior to expulsion from West Point and transfer to another duty post); *Glines* v. *Wade*, 586 F.2d 675 (9th Cir. 1978) *reversed on other grounds*, *Brown* v. *Glines*, 444 U.S. 348; *Orloff* v. *Willoughby*, 345 U.S. 83 (assignment to medical specialist field required by statute must be complied with by the Army); *Tigue* v. *Swain*, 585 F.2d 909 (8th Cir. 1978) (reviewed exclusion of plaintiff from position involving access to nuclear program); *Mir* v. *Fosburg*, 646 F.2d 342 (9th Cir. 1980); *Taylor* v. *Jones*, 653 F.2d 1193 (removed from recruiter position because of race).

Also, internal military decisions involving promotion are reviewable. *Schlesinger* v. *Ballard*, 419 U.S. 498; *Dilley* v.

Alexander, 603 F.2d 914 (D.C. Cir. 1979); *Vander Molen* v. *Stetson*, 571 F.2d 617.

Internal military decisions involving the basis for determining whether to discharge a person is reviewable if in violation of the law. *Johnson* v. *Reed*, 609 F.2d 784 (5th Cir. 1980); *Hodges* v. *Calloway*, 499 F.2d 417; *Schwartz* v. *Covington*, 341 F.2d 537; *Harmon* v. *Brucker*, 355 U.S. 579; *Denton* v. *Secretary of the Air Force*, 483 F.2d 21.

In this case, the respondents allege violations of the right to equal treatment and opportunity under naval regulations.[45a] They were denied ratings, advancement, training, and unjustly disciplined, subjected to humilitating threats, given adverse and improper performance evaluations, and assigned to menial tasks. All of the actions were taken because of purposeful discrimination by petitioners. These actions should be held reviewable on the merits by the federal district court to determine whether the rights of the respondents were violated under naval regulations. Racial discrimination must not be sanctioned, encouraged or promoted.

C. This Court Should Order That The Federal District Court Apply The *Mindes* Factors To Determine Whether The Claims Of The Black Enlisted Personnel For Racial Discrimination Under The Fifth Amendment Are Reviewable.

This Court has never elaborated standards of reviewability of internal military decisions involving administrative matters where violation of constitutional rights are involved. During the last ten years, this Court has decided numerous cases involving internal military matters but has not elaborated any standards. *Parisi* v. *Davidson*, 405 U.S. 34; *Schlesinger* v. *Ballard*, 419 U.S. 498; *Brown* v. *Glines*, 444 U.S. 348; *Secretary of the Navy* v. *Huff*, 444 U.S. 453 (1980); *United States* v. *Larinoff*, 431 U.S. 864.

[45a] OPNAV INSTRUCTION 5354.1a

The Fifth Circuit opinion in *Mindes* v. *Seaman*, 453 F.2d at 201 is the most comprehensive, elaborate judicial examination of reviewability of military decisions involving allegation of violation of constitutional rights to date.

This test should only be applied to review challenges based on a violation of constitutional rights, and not for violations of statutes or regulations. First, many grievances are only common law torts but they can be alleged in constitutional terms. Constitutional claims are unequal in the scale of values. A hair cut regulation will be different than a conviction and sentence to confinement from a court-martial. See Peck, *The Justices and The Generals, The Supreme Court and Judicial Review of Military Activities*, 70 Mil. L. Rev. 1.

But the balancing test to determine reviewability of constitutional claims is best adapted to both protect the interest of the individual and that of the military.

The *Mindes* test has been followed and applied to determine the reviewability in numerous circuits.[46]

The petitioners oppose this approach of reviewability that has been tried and tested by nearly *every* court of appeal. Their opposition is based on the argument that the military actions

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[46] *Dilley* v. *Alexander*, 603 F.2d 914 (D.C. Cir. 1974); *Vander Mollen* v. *Stetson*, 571 F.2d 617 (D.C. Cir. 1977); *Crawford* v. *Cushman*, 531 F.2d 1114 (2nd Cir. 1976); *Dillard* v. *Brown*, 652 F.2d 316 (3rd Cir. 1981) (only this circuit refused to follow *Mindes*); *Lane* v. *Secretary of the Army*, 504 F. Supp. 39 (D.Md. 1980), *a'ffd.* 639 F.2d 780 (4th Cir. 1980); *Nesmith* v. *Fulton*, 615 F.2d 196 (5th Cir. 1980); *Johnson* v. *Reed*, 609 F.2d 784 (5th Cir. 1980); *Hodges* v. *Calloway*, 499 F.2d 417 (5th Cir. 1974); *Seepe* v. *Department of the Navy*, 518 F.2d 760 (6th Cir. 1975); *ben Shalom* v. *Secretary of the Army*, 489 F. Supp. 964 (D. Wis. 1980); *Taylor* v. *Jones*, 653 F.2d 1193 (8th Cir. 1981); *Denton* v. *Secretary of the Air Force*, 483 F.2d 21 (9th Cir. 1973); *Schlanger* v. *United States*, 586 F.2d 667, 671 (9th Cir. 1978) *cert. denied*, 441 U.S. 943 (1979); *Glines* v. *Wade*, 586 F.2d 675, 678 n.4 *rev'd on other grounds sub. nom. Brown* v. *Glines*, 444 U.S. 348; *Lindenau* v. *Alexander*, 663 F.2d 68 (10th Cir. 1981); *Linfors* v. *United States*, 673 F.2d 332 (11th Cir. 1982).

should be shielded from civilian review because the civilian courts cannot make determinations on military functions and that the service personnel can still bring his superior officer to court for review on the balancing test. (Pet. Brief, 30)

But the *Mindes* balancing test is intended as a compromise to both protect military expertise and also to protect individual constitutional liberties. The federal courts are best determined to undertake that task.

It is incredible that the government in this day and age can argue that military officers should not be subject to the United States Constitution. The reply to this was best stated in *United States* v. *Lee*, 106 U.S. 196, 220 (1882) one hundred years ago, "No man in this country is so high that he is above the law . . . All officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it."

They also argue that it would be improper to have a federal court review the decision of the military if it involves a duty assignment and miscite *Orloff* v. *Willoughby*, 345 U.S. at 93.

This Court in *Orloff* v. *Willoughby*, 345 U.S. 83 ruled that it will review a duty assignment only when it is made in violation of a statutory or constitutional provision. The other broad language it cites in *Orloff* saying that this Court would allow military discrimination against its enlisted members, in this case, is absurd. It would mean that the military could practice racial discrimination with impunity. The government in *Mindes* v. *Seaman*, settled the same argument. The Court there stated:

> "The court could not stay its hand if for example it was shown that only Black men were assigned to combat positions while whites were given safe jobs in the sanctuary of rear echelons." 453 F.2d at 199.

Existing precedent points the way to resolution of this case. Military officers have in the past been held amenable to suit for their wrongful conduct. And, their actions are not insulated from review merely because they take place in a military context. To be sure, military officers are entitled to a measure

of protection, in the form of qualified immunity. Likewise, constitutional provisions may at times, have to be shaped to fit the military environment. But, there is no need nor precedent for erecting a total barrier to suit. As will be demonstrated in the sections to follow, in short, a military officer is amenable to a *Bivens* damage action for racial discrimination albeit with a qualified immunity defense, and the courts must review those actions as stated by the Court of Appeals below.

POINT III

NAVAL OFFICERS ARE ENTITLED TO QUALIFIED IMMUNITY ONLY

For almost two centuries, Congress, although undoubtedly invested with power to do so, has refrained from conferring absolute immunity upon military officers. When this Court was invited to intervene and judicially create an intra-military immunity, it declined to erect an absolute barrier to suit. *Dinsman* v. *Wilkes*, 53 U.S. (12 How.) 390, 403-404. Yet, despite the historic refusal of both Congress and the Court to absolutely immunize military officers, the government in effect suggests that there is an automatic and complete bar prohibiting all actions against those officers for constitutional violations.

Recognition of an absolute intra-military immunity would be an unprecedent step, not only from an historic but also from a legal and analytical standpoint. As this Court has emphasized in its modern immunity decisions, even high level executive officials can find sufficient breathing room to perform their duties when afforded qualified immunity. At the same time, those officials who tread beyond the wide realm of protection provided by that immunity, and in the process cause injury, are subject to a damage action. It was precisely these considerations which prompted the Court to hold only recently that confidential advisers to the President, like others at the highest level of government, are entitled to a qualified and not an absolute immunity. *Harlow* v. *Fitzgerald*, ___ U.S. ___, 73 L.Ed.2 at 411.

That same analysis, and the balance it strikes, is particularly applicable to the present circumstances. Military officers must be permitted to make legitimate judgments and decisions, free from the spectre of liability. It is crucial, on the other hand, not to grant those officials a license to commit the most flagrant of constitutional violations. The solution which this Court has endorsed in both a civilian and military context, with the tacit concurrence of Congress, is qualified immunity.

A. This Court Should Not Grant Absolute Immunity To Military Officers Absent Congressional Action.

The Constitution gives Congress limited power for making rules for the military. Article I, Section 8 of the Constitution. Congressional power extends to every aspect of military life, including military discipline. It is for the Congress to determine initially whether disciplinary and other considerations necessitate absolute immunity for military officers.

Congress has repeatedly controlled the liability of military officers for damages. Rather than granting absolute immunity, it has traditionally provided for removal of damage suits against federal officers to a federal court.[47] When Congress passed the removal statutes, military officers were subject to liability.

It is especially significant that Congress declined to enact an absolute immunity defense during the Civil War, despite its obvious familiarity with legislating defenses for officers in that era.[48] Only a few short years before the Civil War—in 1848 and 1851—this Court squarely ruled that a military officer was liable to an enlisted man in damages for constitutional and other wrongs. *Wilkes* v. *Dinsman*, 48 U.S. (7 How.) 83

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[47] See Act of February 4, 1815, Section 8, 3 Stat. 195, 198-199; Act of March 2, 1833, 4 Stat. 612, 632; and Act of August 29, 1916, Section 3, Article 117, 39 Stat. 169.

[48] The only exception was the absolute immunity passed in 1863 for the duration of the Civil War which was limited to officers whose actions were taken pursuant to Presidential orders. Act of March 3, 1863, Section 4, 12 Stat. 755.

("*Wilkes I*"); *Dinsman* v. *Wilkes*, 53 U.S. (12 How.) 390 ("*Wilkes II*"). And, in those very decisions, the Court likewise refused to recognize absolute immunity for the officers. Although aware of these rulings, and although it legislated in this precise field, Congress took no steps to alter them.

On only one occasion has Congress granted absolute immunity—to medical personnel in the armed forces. 10 U.S.C. § 1089. See *Howell* v. *United States*, 489 F. Supp. 147 (D. Tenn. 1980); *Hernandez* v. *Koch*, 443 F. Supp. 347 (D.C. Cir. 1977). That Congress granted absolute immunity only to military medical personnel demonstrates both its awareness and approval of the *Wilkes* rule of qualified immunity for military officers. For, unless there is potential liability, there would be no need for absolute immunity. And, had Congress desired to preclude liability of military officers generally, it would not have limited the immunity statute to medical personnel.

In sum, although Congress has without question been cognizant of the potential liability of military officers, and although it has enacted absolute immunity for certain personnel and at times created special defenses, it has declined to legislate any across-the-board absolute immunity. Given the unique role of Congress in military affairs, this Court should not now intervene to disturb that congressional judgment.

B. Military Officers Should Be Granted Only Good Faith Immunity Under *Harlow* v. *Fitzgerald*.

Executive officials are not entitled to absolute immunity. It is not critical to their power to exercise discretion and to act decisively. *Harlow* v. *Fitzgerald*, ___ U.S. ___, 73 L.Ed.2d 396, 407; *Butz* v. *Economou*, 438 U.S. 478, 506. They are entitled to a qualified immunity, which is necessary: (1) to deter the officers from violating the Constitution; (2) to provide redress to the injured party, and (3) to avoid "draw[ing] a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." *Har-*

low v. *Fitzgerald*, 73 L.Ed.2d at 404, 407-8. *Butz* v. *Economou*, 438 U.S. at 504-5. The court emphasized that, "[f]or executive officials in general, our cases make plain that qualified immunity represents the norm." *Harlow* v. *Fitzgerald*, 73 L.Ed.2d at 404.

Petitioners are unable to bring themselves within the recognized categories of absolute immunity under common law or constitutional precedent. Common law precedent opposes absolute immunity for military officers. *Dinsman* v. *Wilkes*, 53 U.S. (12 How.) 390; *Wilkes* v. *Dinsman*, 48 U.S. (7 How.) 89: *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974). The Constitution and court decisions point to accountability of military officers to judicial review. *Harlow* v. *Fitzgerald*, 73 L.Ed. at 10, *Taylor* v. *Jones*, 653 F.2d at 1196; *Tigue* v. *Swain*, 585 F.2d at 913-914; *Alvarez* v. *Wilson*, 431 F. Supp. at 141. ". . . No military purpose—neither discipline, nor orders, nor readiness for combat— . . . would justify absolute immunity for racially discriminatory acts perpetrated by military officers." *Id.* at 146.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully Submitted,

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APPENDIX

OPNAV INSTRUCTION 5354.1a, March 9, 1978

"It is the policy of the Navy to ensure equality of opportunity and treatment for all military members and civilian employees of the Department of the Navy regardless of race, creed, color, sex or national origin . . . Discrimination resulting in the denial of equal opportunity to any individual will not be tolerated in the Navy."